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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ELISEO V. BARRAGAN, an)	Case No. CV 15-02614 DDP (FFMx)
individual; MARIA GUZMAN, an)	
individual, ELISEO VARGAS,)	ORDER RE DEFENDANTS' MOTION TO
JR., an individual; MARYCHUY)	DISMISS
VARGAS, an individual;)	
ELISEO V. VARGAS as guardian)	[Dkt. No. 7.]
ad item for A.V., a minor;)	
AGENLINA VARGAS, an)	
individual and as guardian)	
ad litem for M.P, a minor,)	
A.P., a minor, and L.L. a)	
minor, MIRTHA AYALA, an)	
individual and as guardian)	
ad litem for R.H., Jr. a)	
minor and P.H., a minor ,)	
)	
Plaintiffs,)	
)	
v.)	
)	
DEUTSCHE BANK NATIONAL TRUST)	
COMPANY, as Trustee, in)	
Trust for Registered Holders)	
of Long Beach Mortgage Loan)	
Trust 2006-WL2, Asset-Backed)	
Certificates, Series 2006-)	
WL2, a banking business)	
entity; SELECT PORTFOLIO)	
SERVICING, a banking)	
business entity,)	
)	
Defendants.)	

1 Presently before the Court is Defendants' motion to dismiss.
2 (Dkt. No. 7.) Having heard oral arguments and considered the
3 parties' submissions, the Court adopts the following order.

4 **I. BACKGROUND**

5 Plaintiff Barragan is the resident/owner of 4615-4615 3/4
6 Saint Charles Place, Los Angeles, CA 90019. (Compl., ¶ 18.) The
7 mortgage on the property was secured by a deed of trust, initially
8 held by JPMorgan Chase Bank and later transferred to Defendant U.S.
9 Bank. (Id. at ¶ 19.) Several times between 2011 and 2014,
10 Plaintiff fell behind on his mortgage payments and received notices
11 of Defendant's intent to sell the property, based on Plaintiff
12 Barragan's default. (Id. at ¶¶ 20-33.) Each time, Plaintiff
13 Barragan immediately contacted the bank to make arrangements to
14 bring his payments current. (Id.)

15 On or shortly after March 6, 2014, Plaintiff Barragan received
16 another such notice; he then submitted an application for a loan
17 modification, as he alleges he was advised to do by Defendants.
18 (Id. at ¶ 33-34.) On August 15, 2014, Defendant Select Portfolio
19 Servicing ("SPS") sent him a letter stating that it was reviewing
20 Plaintiff's account "for loss mitigation assistance," including
21 loan modification. The letter announced that SPS would "continue
22 the foreclosure process" while reviewing the account, but that "NO
23 FORECLOSURE SALE WILL BE CONDUCTED AND YOU WILL NOT LOSE YOUR HOME
24 during the evaluation." (Compl., Ex. 1.) On September 25, 2014,
25 SPS sent another letter explaining that it had not received all the
26 documents needed for its evaluation and was therefore "clos[ing]
27 this request for review." (Id., Ex. 2.) That letter also stated
28 that Plaintiff Barragan had thirty calendar days to "contact SPS to

1 discuss the reason for non-approval," and that no foreclosure sale
2 would occur during the 30-day window. (Id.)

3 On September 26, 2014, however, Defendants did conduct a
4 foreclosure sale. (Compl., ¶ 39.) Plaintiff Barragan alleges that
5 sometime shortly thereafter, one of his tenants on the property
6 refused to pay rent because of the foreclosure sale. (Id. at ¶
7 40.) On October 1, 2014, Plaintiff filed an unlawful detainer
8 action against the tenant. (Id. at ¶ 41.) The tenant's defense to
9 the unlawful detainer action was that Plaintiff was not the owner
10 of the property. On November 1, a judge denied Plaintiff
11 Barragan's claim on the ground that he was not the record owner of
12 the property. (Id. at ¶ 43.)

13 On October 21, 2014, Plaintiff filed for bankruptcy. (Id. at
14 ¶ 44.) The Complaint seems to indicate that at that time he was
15 unaware that the foreclosure sale had taken place and acted in
16 reliance on Defendants' representation that no foreclosure sale
17 would take place. (Id.) Defendant Deutsche Bank then obtained
18 relief from the automatic stay in the bankruptcy and evicted the
19 residents from the property on January 8, 2015. (Id. at ¶¶ 46-51.)
20 Also on January 8, Plaintiff Barragan's bankruptcy plan was not
21 confirmed by the bankruptcy judge, because Plaintiff was no longer
22 the owner of the property. (Id. at ¶ 52.) On January 9, 2015,
23 Plaintiff Barragan alleges, a representative of Defendant SPS
24 admitted that "it was wrong for them to have foreclosed" and told
25 him the foreclosure sale would be rescinded. (Id. at ¶ 54.)
26 Plaintiffs filed this action in state court on January 20, 2015.
27 (Compl. at 1.) The sale was rescinded on March 25, 2015. (Defs.'
28

1 RJN, Ex. 13.) This action was removed to federal court on April 8,
2 2015. (Dkt. No. 1.)

3 **II. LEGAL STANDARD**

4 In order to survive a motion to dismiss for failure to state a
5 claim, a complaint need only include "a short and plain statement
6 of the claim showing that the pleader is entitled to relief." Bell
7 Atl. Corp. v. Twombly, 550 U.S. 544, 55 (2007) (quoting Conley v.
8 Gibson, 355 U.S. 41, 47 (1957)). A complaint must include
9 "sufficient factual matter, accepted as true, to state a claim to
10 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.
11 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). When
12 considering a Rule 12(b)(6) motion, a court must "accept as true
13 all allegations of material fact and must construe those facts in
14 the light most favorable to the plaintiff." Resnick v. Hayes, 213
15 F.3d 443, 447 (9th Cir. 2000).

16 **III. DISCUSSION**

17 **A. Judicial Estoppel**

18 As an initial matter, Defendants contend that Plaintiff
19 Barragan is judicially estopped from bringing any of his claims,
20 because he did not list his claims as assets in his bankruptcy.
21 Plaintiffs argue, however, that he is not estopped, because the
22 present claims were filed with this Court several months after the
23 bankruptcy was filed.

24 "Judicial estoppel is an equitable doctrine that precludes a
25 party from gaining an advantage by asserting one position, and then
26 later seeking an advantage by taking a clearly inconsistent
27 position." Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778,
28 782 (9th Cir. 2001). A party is judicially estopped if the two

1 positions asserted are "clearly inconsistent," a court actually
2 accepted and relied on the earlier position, and the party would
3 either receive an unfair advantage or impose an unfair detriment on
4 the opposing party by asserting the inconsistent positions. Id. at
5 782-83.

6 Specifically, a party who files for bankruptcy but fails to
7 list a pending legal claim among his assets has asserted
8 inconsistent claims before the bankruptcy court and the other
9 court, and may be estopped from pursuing his legal claim. Id. at
10 784. Nor does the legal claim have to be filed prior to the filing
11 of the bankruptcy to be estopped: "Judicial estoppel will be
12 imposed when the debtor *has knowledge of enough facts to know that*
13 *a potential cause of action exists during the pendency of the*
14 *bankruptcy*, but fails to amend his schedules or disclosure
15 statements to identify the cause of action as a contingent asset."
16 Id. (emphasis added).

17 In this case, it is undisputed that Plaintiff Barragan did not
18 include any notice of his legal claims in his bankruptcy petition.
19 Barragan alleges that he did not actually know at the time he filed
20 the petition that Defendants had proceeded to the foreclosure
21 sale.¹ Nonetheless, he must have known of the sale by November 1,
22 2014, when the state court ruled against him in the unlawful
23 detainer action - or at the very latest by November 5, 2014, when
24 Deutsche Bank filed for relief from the bankruptcy court's
25 automatic stay. He knew of facts related to his causes of action
26

27 ¹The parties do not brief, and the Court does not at this
28 point determine, whether Barragan immediately had constructive
knowledge of the foreclosure sale based on recordation.

1 as to the evictions by January 8, 2015. He certainly knew all the
2 relevant facts when he filed this action on January 20, 2015. Yet
3 to date, nearly six months later, Plaintiff Barragan does not seem
4 to have amended his bankruptcy schedules to reflect this lawsuit.

5 On the other hand, there has not yet been a decision in the
6 bankruptcy case; thus, it is not clear that Plaintiff Barragan has
7 yet obtained an unfair advantage in the bankruptcy by failing to
8 disclose this suit. The bankruptcy court has continued the hearing
9 in his case to June 24, 2015. (Bankruptcy Case No. 2:14-bk-29876-
10 SK, Dkt. No. 27.) Thus, the bankruptcy court does not appear to
11 have "accepted" Plaintiff Barragan's representations yet, nor has
12 he yet received a confirmed bankruptcy plan based on those
13 representations.

14 The Court therefore orders as follows: if Plaintiff Barragan
15 does not amend his bankruptcy schedules to reflect any and all
16 claims he wishes to pursue in this case before the bankruptcy court
17 confirms a bankruptcy plan, the Court will consider his claims
18 estopped and will dismiss at that time, on an appropriate and
19 timely motion by Defendants. If he does amend his bankruptcy
20 schedules before any decision by the bankruptcy court on his
21 bankruptcy plan, he may proceed with his claims.

22 **B. Standing As To Other Plaintiffs**

23 Defendants argue that the Plaintiffs other than Barragan do
24 not have standing to bring these claims, because "all of the claims
25 raised in the Complaint are predicated upon the contractual
26 relationship between Plaintiff Barragan and Defendants." (Defs.'
27 Mem. P. & A. at 6.) This is not quite true: the wrongful eviction,
28 interference with contract, and negligence claims are not directly

1 predicated on that relationship and could, in a theoretical sense,
2 stand as independent torts. As to the other claims, however,
3 Defendants are correct.

4 Plaintiffs assert that they do have standing, because they
5 were "foreseeable victims, were forced from their home, and were
6 damaged thereby." (Opp'n at 8:16-18.) Plaintiffs cite no
7 authority that these facts, even if shown, give them standing. To
8 establish standing, "the plaintiff must have suffered an 'injury in
9 fact'—an invasion of a legally protected interest." Lujan v.
10 Defenders of Wildlife, 504 U.S. 555, 560 (1992).

11 The alleged agreement between Barragan and Defendants² cannot
12 provide that legally protected interest: "It is a general rule of
13 law that before recovery can be had under a contract by a third
14 party, he must show that the contract was made for his direct
15 benefit." Williams v. Fenix & Scisson, Inc., 608 F.2d 1205, 1208
16 (9th Cir. 1979). No facts have been alleged to show that the
17 agreement, if any, was for the other Plaintiffs' benefit
18 specifically, rather than Barragan's benefit as a homeowner, or
19 that Defendants knew that it was for their benefit.³

20 Similarly, the consumer protection statutes cited in the
21 Complaint operate for the benefit of homeowners, and Plaintiffs
22
23

24 ²Or, more likely, quasi-contract. See Part III.C., infra.

25 ³"A third party . . . has an enforceable right by reason of a
26 contract made by two others . . . if the promised performance will
27 be of pecuniary benefit to him and *the contract is so expressed as*
28 *to give the promisor reason to know that such benefit is*
contemplated by the promisee as one of the motivating causes of his
making the contract." Williams v. Fenix & Scisson, Inc., 608 F.2d
1205, 1208 (9th Cir. 1979) (emphasis added).

1 have cited no authority to show that they should be extended to
2 provide a private right of action to renters.

3 Finally, the non-Barragan Plaintiffs are also not entitled to
4 a quiet title action or a wrongful foreclosure action, as they are
5 not the owners of the property in question.

6 On all causes of action except wrongful eviction, interference
7 with contract, and negligence, Plaintiffs other than Barragan do
8 not have standing in this case.

9 **C. Breach of Contract Claim**

10 Plaintiffs allege that Defendants were "contractually
11 obligated" not to foreclose on the property, both because of the
12 existence of certain consumer protection statutes and because of
13 the letters SPS sent to Plaintiff Barragan averring that there
14 would be no sale and he would not lose his home. (Compl., ¶¶ 57-
15 59.)

16 In California, a plaintiff asserting breach of contract must
17 prove the following elements: "(1) existence of the contract; (2)
18 plaintiff's performance or excuse for nonperformance; (3)
19 defendant's breach; and (4) damages to plaintiff as a result of the
20 breach." CDF Firefighters v. Maldonado, 158 Cal.App.4th 1226,
21 1239, 70 Cal.Rptr.3d 667 (2008). "Under California law, the
22 essential elements for a contract are (1) parties capable of
23 contracting; (2) their consent; (3) a lawful object; and (4)
24 sufficient cause or consideration. U.S. ex rel. Oliver v. Parsons
25 Co., 195 F.3d 457, 462 (9th Cir. 1999).

26 Here, there was no contract. Consumer protection statutes,
27 though they form part of the background of a lawful contract, do
28 not create a contract out of thin air. As to the letters, they

1 also do not create a contract, because there is no consideration.
2 Even assuming SPS promised not to initiate a foreclosure sale, it
3 received nothing of benefit from Plaintiff Barragan in exchange for
4 that promise. Plaintiffs state that Barragan "has performed and
5 was ready, willing, and able to perform all acts required . . . as
6 stated in the SPS letters," (Compl., ¶ 60), but they do not
7 identify any such acts that would have benefitted SPS (as opposed
8 to mere procedural requirements for a loan modification). There is
9 thus no consideration alleged, and thus no valid contract alleged.⁴

10 However, Plaintiffs allege Plaintiff Barragan's good-faith
11 reliance on SPS's promises in the letters. (E.g., Opp'n at 7:14-
12 20.) It appears, therefore, that the Complaint is attempting to
13 plead the elements of a quasi-contract or promissory estoppel
14 claim. The Court will not attempt to divine the details of that
15 claim at present; it is enough to note that it does not appear
16 futile for Plaintiffs to attempt to amend their complaint to state
17 such a claim.

18 The Court therefore holds that there is no breach of contract
19 claim and dismisses the first cause of action, but with leave to
20 amend to state a claim for promissory estoppel regarding reliance
21 on the letters.

22 **D. Wrongful Foreclosure**

23 The basic elements of a tort cause of action for wrongful
24 foreclosure are as follows:

25
26
27 ⁴The Court also notes that the letters were sent by SPS and do
28 not appear to include Deutsche Bank either by name or by
implication. Thus, apart from the above considerations, the
letters cannot have created a contract binding Deutsche Bank.

1 (1) the trustee or mortgagee caused an illegal, fraudulent, or
2 willfully oppressive sale of real property pursuant to a power
3 of sale in a mortgage or deed of trust; (2) the party
4 attacking the sale . . . was prejudiced or harmed; and (3) in
5 cases where the trustor or mortgagor challenges the sale, the
6 trustor or mortgagor tendered the amount of the secured
7 indebtedness or was excused from tendering.

8 Miles v. Deutsche Bank Nat'l Trust Co., 236 Cal. App. 4th 394, 408
9 (2015). The plaintiff must also show that "no breach of condition
10 or failure of performance existed on the mortgagor's or trustor's
11 part which would have authorized the foreclosure or exercise of the
12 power of sale." Id. Wrongful foreclosure is a tort, and tort
13 damages are recoverable for all proximately-caused injuries to the
14 plaintiff, including lost equity, moving expenses, lost rental
15 income, damage to credit, emotional distress, and punitive damages.
16 Id. at 409.

17 Here, plaintiff alleges an illegal or willfully oppressive
18 sale, based on the same reliance theory advanced in the contract
19 claim above. Had Plaintiff and Defendants reached a formal
20 agreement to modify the loan and bring the payment current,
21 Defendants could not have lawfully foreclosed. Barroso v. Ocwen
22 Loan Servicing, LLC, 208 Cal. App. 4th 1001, 1017 (2012). What the
23 effect is of an informal promise not to foreclose after closure of
24 the review process is less clear. But "[a] foreclosure sale . . .
25 can be set aside if the beneficiary or assignor gives false and
26 misleading information to the trustor that prevents a cure of the
27 default before the foreclosure sale." 4 Harry D. Miller & Marvin
28

1 B. Starr, Cal. Real Est. § 10:254 (3d ed., 2000).⁵ Here, Plaintiff
2 Barragan alleges that Defendants essentially provided false and
3 misleading information about how much time he had before the
4 foreclosure sale would take place.

5 Plaintiff Barragan can also allege harm, because, as noted
6 above, damages in an action for wrongful foreclosure are not
7 limited to the equity in the home (which in this case was
8 presumably restored when the sale was rescinded) but can also
9 encompass moving expenses, lost rental income, and so on.

10 Thus, the key question is whether Plaintiff met his
11 obligations under the tender rule and the performance rule.
12 Despite the somewhat confusing terminology, the requirement that
13 the plaintiff "tender[] the amount of the secured indebtedness"
14 does not necessarily mean that he must tender the entire amount of
15 the loan. Numerous cases define the tender required as "the amount
16 due to cure any default in the obligation to defendant." Munger v.
17 Moore, 11 Cal. App. 3d 1, 8 (Ct. App. 1970). See also Onofrio v.
18 Rice, 55 Cal. App. 4th 413, 424 (1997); Garcia v. World Sav., FSB,
19 183 Cal. App. 4th 1031, 1043 (2010); Miller v. Washington Mut. Bank
20 FA, 776 F. Supp. 2d 1064, 1069 (N.D. Cal. 2011); Barroso v. Ocwen
21 Loan Servicing, LLC, 208 Cal. App. 4th 1001, 1017 (2012).

22 There is a competing line of cases that holds the opposite,
23 stating an apparently absolute rule that the mortgagor must pay the
24 entire amount of the debt. See, e.g., Arnolds Mgmt. Corp. v.
25 Eischen, 158 Cal. App. 3d 575, 578 (1984) ("It is settled that an
26

27 ⁵See also, e.g., Wade v. Markwell & Co., 118 Cal. App. 2d 410,
28 428-29, 258 P.2d 497, 507 (1953) (pledgor could maintain action for
conversion against pledgee who promised that pledgor could redeem
property "any time within the succeeding week," then sold the
property before the week was out).

1 action to set aside a trustee's sale for irregularities in sale
2 notice or procedure should be accompanied by an offer to pay the
3 full amount of the debt for which the property was security.") But
4 that line of cases ignores the maxim that tender is not required
5 when it would be inequitable to do so. Onofrio, 55 Cal. App. 4th
6 at 424.⁶ It also ignores Cal. Civ. Code § 2924c, which provides
7 that mortgagors may avoid nonjudicial foreclosure by tendering the
8 amount *in default*. Section 2924c expresses a clear legislative
9 preference for borrowers to keep their homes if they can tender the
10 amount necessary to cure the default. For judges to nonetheless
11 allow lenders or trustees to wrongfully or fraudulently foreclose,
12 with no penalty unless the borrower can, for some reason, tender
13 the amount of the mortgage in full,⁷ would seem to be an
14 extraordinary invitation to lenders to behave unjustly.

15 Here, Plaintiff Barragan alleges that he "[i]mmediately . . .
16 contacted Deutsche Bank and SPS to make arrangements to bring the
17 monthly mortgage payment current." (Id.) Plaintiff alleges that
18 he was "ready, willing, and able to perform" but that he was
19 advised by Defendants to submit a loan application instead. (Id.
20 at ¶¶ 33, 68.) Where a trustee has refused the tender of the
21 amount due, "the trustor may recover damages from the trustee."
22 Moeller v. Lien, 25 Cal. App. 4th 822, 832 (1994).

23
24 ⁶Indeed, the equitable "exceptions and qualifications" to the
25 tender rule are so numerous that some courts have found that they
26 militate "against a blanket requirement of the tender rule at the
pleading stage." Tamburri v. Suntrust Mortgage, Inc., No.
C-11-2899 EMC, 2011 WL 6294472, at *5 (N.D. Cal. Dec. 15, 2011).

27 ⁷Presumably borrowers would not borrow if they could pay the
28 purchase price of the home in full, so the requirement that they do
so when a lender or trustor wrongfully forecloses borders on the
absurd.

1 Defendants argue that Plaintiff Barragan cannot make out a
2 claim for wrongful foreclosure, because on the facts alleged he had
3 failed to perform by not paying the monthly mortgage payments.
4 (Compl., ¶ 33 (admitting that monthly payments were not "current"
5 at the time the foreclosure sale notice was issued).) But the
6 point of the performance rule, as the Miles court explained, is
7 simply to ensure that an otherwise valid sale is not voided for
8 merely technical violations. 236 Cal. App. 4th at 409. To read it
9 as a bar based on failure to actually pay, where the trustor or
10 lender has effectively declined to accept payment and has misled
11 the borrower as to how much time is available to him to take action
12 to cure the default, would, again, produce an inequitable result.

13 Plaintiff has pled sufficient facts to state a claim for
14 wrongful foreclosure.

15 **E. Consumer Protection Act**

16 Plaintiffs allege that Defendants violated the Dodd-Frank Wall
17 Street Reform and Consumer Protection Act of 2010. However,
18 Plaintiffs point to no particular section of that act that has been
19 violated, nor to any particular facts supporting an allegation that
20 a violation has occurred.

21 Plaintiff does allege that Defendants "violated" the Consumer
22 Financial Protection Bureau and the "National Mortgage Settlement
23 (NMS) Act." As to the former, it is hard to see how a government
24 agency can be violated. As to the latter, the Court assumes this
25 refers to the consent decree commonly referred to as the "National
26 Mortgage Settlement," see United States et al. v. Bank of America
27 et al., No. 12-cv-00361-RMC (D.D.C. April 4, 2014). However, in
28 the absence of citations or anything other than the most minimal or

1 conclusory argument in either the complaint or the opposition, (see
2 Opp'n at 9), the Court declines to attempt to discern how that
3 settlement relates to this case.

4 This cause of action is therefore dismissed.

5 **F. California Home Owner Bill of Rights**

6 Plaintiffs allege that Defendants violated the anti-"dual
7 tracking" provisions of the Home Owner Bill of Rights ("HOBR"),
8 which provides that:

9 If a borrower submits a complete application for a first lien
10 loan modification offered by, or through, the borrower's
11 mortgage servicer, a mortgage servicer, mortgagee, trustee,
12 beneficiary, or authorized agent shall not record a notice of
13 default or notice of sale, or conduct a trustee's sale, while
14 the complete first lien loan modification application is
15 pending.

16 Cal. Civ. Code § 2923.6(c).

17 Defendants argue that Plaintiff Barragan cannot allege a
18 violation of HOBR's anti-dual tracking provision for two reasons.
19 First, he is not a borrower under HOBR, because he "has filed a
20 case under Chapter . . . 13 of Title 11 of the United State code"
21 and "the bankruptcy court has not entered an order closing or
22 dismissing the bankruptcy case." Cal. Civ. Code § 2920.5(c)(2)(C).
23 Second, Defendants allege Plaintiff Barragan did not submit a
24 "complete application" for the loan modification.

25 Plaintiff was a "borrower" for purposes of alleging a
26 violation of the anti-dual tracking provision of the HOBR. On the
27 facts alleged in the complaint, Plaintiff was not in a bankruptcy
28 proceeding when he applied for the modification, nor when the

1 notice of sale was recorded, nor even when the sale took place.
2 See McLaughlin v. Aurora Loan Servs., LLC, No. SACV 13-01653 JVS
3 RN, 2015 WL 1926268, at *7 (C.D. Cal. Apr. 28, 2015) (plaintiff who
4 filed bankruptcy was "borrower" under the statute because "neither
5 of her bankruptcy petitions were pending when she sought loan
6 modifications"); Withers v. J.P. Morgan Chase Bank N.A., No. C
7 14-0351 SBA, 2014 WL 3418367, at *5 (N.D. Cal. July 11, 2014)
8 (plaintiff was "borrower" under the statute because "both
9 bankruptcy cases were dismissed prior to the recording of the
10 Notice of Trustee's Sale"). That Plaintiff Barragan later filed a
11 bankruptcy case is irrelevant to whether the foreclosure and sale
12 violated HOBR.

13 As to whether Plaintiff Barragan submitted a "complete
14 application," that is a factual question that is better resolved
15 later. "[A]n application shall be deemed 'complete' when a
16 borrower has supplied the mortgage servicer with all documents
17 required by the mortgage servicer within the reasonable timeframes
18 specified by the mortgage servicer." Cal. Civ. Code § 2923.6(h).
19 At the moment, Plaintiff Barragan alleges that he "began the
20 process of a loan modification" and that "SPS acknowledged receipt
21 of the loan modification." (Compl., ¶¶ 33-34.) The Court cannot
22 determine from Plaintiff's exhibits (Compl., Exs. 1, 2) what
23 documents were required, nor what the timeframe was for supplying
24 them. Although Plaintiff's exhibits indicate that SPS informed
25 Plaintiff he had not submitted sufficient documentation, (id., Ex.
26 2), that determination by an interested party is not enough by
27 itself to conclusively show that Plaintiff cannot state a plausible
28 claim for relief under the anti-dual tracking statute. For

1 purposes of the present motion, the Court finds that Plaintiff has
2 alleged, albeit minimally, that he submitted a complete
3 application.

4 Plaintiff Barragan adequately states a claim for violation of
5 the anti-dual tracking provision of the HBOR.

6 **G. Quiet Title**

7 A complaint for an action to quiet title must plead, inter
8 alia, "the adverse claims to the title of the plaintiff against
9 which a determination is sought." Cal. Civ. Proc. Code §
10 761.020(c). The complaint alleges that the "current title owner
11 and purchase of the Property appears to be Defendant, Deutsche
12 Bank." (Compl., ¶ 95.) However, judicially noticeable public
13 records show, and Plaintiff admits, that the sale was subsequently
14 rescinded. (Defs.' RJN, Ex. 13; Opp'n at 9.) Thus, the claim
15 would appear to be moot.

16 Additionally, Plaintiff Barragan has not alleged that he has
17 paid the debt secured by his mortgage. A mortgagor "cannot quiet
18 his title against the mortgagee without paying the debt secured."
19 Lane v. Vitek Real Estate Indus. Grp., 713 F. Supp. 2d 1092, 1103
20 (E.D. Cal. 2010).

21 This claim is therefore dismissed.

22 **H. Wrongful Eviction**

23 California recognizes the tort of wrongful eviction. Barkett
24 v. Brucato, 122 Cal. App. 2d 264, 275 (1953). That tort is
25 understood to be "a nontrespassory invasion of another's interest
26 in the private use and enjoyment of land if . . . the invasion the
27 invasion is either . . . intentional and unreasonable; or . . .
28 unintentional and otherwise actionable under the rules governing

1 liability for negligent, reckless or ultrahazardous conduct." Id.
2 at 274-75. Generally, the claim lies where the plaintiff vacates
3 the premises within a reasonable time. Nativi v. Deutsche Bank
4 Nat'l Trust Co., 223 Cal. App. 4th 261, 292 (2014).

5 The tort is usually applied in cases where a landlord engages
6 in self-help or otherwise behaves badly toward his tenants in an
7 effort to get them to leave. Nonetheless, "[a]llthough wrongful
8 eviction can refer to eviction of a tenant or purchaser and be
9 based in contract, it can also refer to an action that is not based
10 in contract as, for example, the eviction of a trespasser."
11 Stanford Ranch, Inc. v. Maryland Cas. Co., 89 F.3d 618, 628 (9th
12 Cir. 1996). The key inquiry is whether the defendant "tortiously
13 evict[ed] another from property if the other had some right to be
14 there." Id.

15 Plaintiffs do not point to any authority applying this tort to
16 the use of the foreclosure process. However, in Campos v. Bank of
17 Am., Inc., the court found that plaintiffs alleging a deficient
18 foreclosure sale could also allege wrongful eviction, inasmuch as
19 they were forced to leave the property to avoid an action for
20 unlawful detainer. No. C 11-0431SBA, 2011 WL 2600888, at *5-6
21 (N.D. Cal. June 30, 2011).

22 Additionally, Plaintiffs allege that there was at least one
23 non-family, paying tenant. A bona fide tenant does not lose his
24 rights of occupancy after a foreclosure, except under certain
25 circumstances defined by statute. Protecting Tenants at
26 Foreclosure Act of 2009, PL 111-22, May 20, 2009, 123 Stat 1632,
27 1660-61 ("In the case of any foreclosure on a federally-related
28 mortgage loan or on any dwelling or residential real property

1 after the date of enactment of this title, any immediate successor
2 in interest in such property pursuant to the foreclosure shall
3 assume such interest subject to . . . the rights of any bona fide
4 tenant . . . under any bona fide lease entered into before the
5 notice of foreclosure"). See also Cal. Civ. Proc. Code §
6 1161b(b). Although the complaint does not identify the non-family
7 tenant, the complaint could be amended to do so, and the statutory
8 protections for preexisting tenants could likewise form an
9 alternative basis for the wrongful eviction claim as to that
10 tenant.

11 **I. Negligence**

12 Plaintiffs have not identified any particular legally
13 cognizable duty that Defendants owed them that would give rise to a
14 negligence claim. "[A]s a general rule, a financial institution
15 owes no duty of care to a borrower when the institution's
16 involvement in the loan transaction does not exceed the scope of
17 its conventional role as a mere lender of money."⁸ Nymark v. Heart
18 Fed. Sav. & Loan Assn., 231 Cal. App. 3d 1089, 1096 (1991). Only
19 where the lender "actively participates" in the financed activity
20 "beyond the domain of the usual money lender" does a duty of care
21 arise. Id. Plaintiffs have not alleged that Deutsche Bank or SPS
22 actively participated in the use or leasing of the mortgaged homes.
23 Rather, Defendants' activities as alleged have been limited to the
24 "conventional role" of a lender: servicing a mortgage loan and
25 reviewing the loan for modification. See Carbajal v. Wells Fargo

27 ⁸A *fortiori*, of course, a lender does not owe a duty of care
28 to third parties, even if they are negatively affected by actions
on the loan.

1 Bank, N.A., No. CV 14-7851 PSG PLAX, 2015 WL 2454054, at *5-6 (C.D.
2 Cal. Apr. 10, 2015) (reviewing cases and concluding there is no
3 duty of care in reviewing loan modification applications).

4 The negligence claim is therefore dismissed.

5 **J. Interference With Contract**

6 "The elements which a plaintiff must plead to state the cause
7 of action for intentional interference with contractual relations
8 are (1) a valid contract between plaintiff and a third party; (2)
9 defendant's knowledge of this contract; (3) defendant's intentional
10 acts designed to induce a breach or disruption of the contractual
11 relationship; (4) actual breach or disruption of the contractual
12 relationship; and (5) resulting damage." Pac. Gas & Elec. Co. v.
13 Bear Stearns & Co., 50 Cal. 3d 1118, 1126 (1990).

14 Plaintiffs allege that Defendants interfered with Plaintiff
15 Barragan's contract with his tenant when they foreclosed, because
16 the tenant ceased paying rent when Plaintiff Barragan was no longer
17 the record owner of the property. (Compl., ¶¶ 40-43, 107-12.) The
18 Court notes that the first element of the tort, if satisfied at
19 all, is satisfied only with a great deal of guesswork and
20 assumption on the Court's part. The complaint does not appear to
21 identify Plaintiff Barragan's tenant, calling him or her only "the
22 one non-family tenant." (Id. at ¶ 40.) Nor does the complaint
23 explicitly allege a valid lease contract, though perhaps the
24 allegation that there is a "tenant" includes, by implication, an
25 allegation of a lease contract.

26 But the more fundamental flaw in Plaintiffs' complaint is that
27 it presents no facts that would allow the inference that the
28 foreclosure was "designed" to interfere with the contract, rather

1 than simply doing so as an incident to the purpose of acquiring the
2 property. Plaintiffs assert that Defendants "knew (or reasonably
3 should have known)" of certain "rental contract agreements for this
4 multi-family 4-plex apartment unit." (Id. at ¶ 108.) Perhaps,
5 given the nature of the property, this is reasonable. But the
6 conclusory assertion that Defendants "deliberately attempted to
7 terminate these agreements," (id. at ¶ 109), without more, is not
8 enough to sustain this claim.

9 Additionally, there is something strange about an interference
10 with contract claim as to a change of ownership of a rental unit.
11 Presumably, if the foreclosure sale was not wrongful, the fact that
12 it effectively terminates the contractual relationship between the
13 tenant and the former landlord would not be a cause of action in
14 and of itself. Plaintiff Barragan's wrongful foreclosure claim, if
15 successful, can provide a remedy for lost rental income, and that
16 vehicle seems more appropriate for dealing with the consequential
17 damages from an unlawful foreclosure, if unlawful it was.

18 The claim for interference with contract is dismissed.

19 **K. Declaratory Relief**

20 "[A]ny court of the United States, upon the filing of an
21 appropriate pleading, may declare the rights and other legal
22 relations of any interested party seeking such declaration, whether
23 or not further relief is or could be sought." 28 U.S.C. § 2201(a).
24 Plaintiff Barragan seeks declaratory judgment as to the parties
25 "respective rights and duties . . . and their rights to foreclose
26 and/ownership title to the property." (Compl., ¶ 114.) Although
27 much of the controversy in this case is backward-looking, nothing
28 prevents the Court from determining the rights and duties of the

1 parties going forward. However, in this matter, it is unclear
2 exactly what rights and duties are controverted. Plaintiff states
3 that Defendants "did not have the right to proceed with the
4 September 26, 2014, foreclosure Trustee's Sale" and therefore do
5 not have "the right to claim an ownership interest in the
6 Property." (Id.) But Defendants do not claim an ownership
7 interest in the property; the sale was rescinded. The issue is
8 therefore moot, unless Defendants later lay claim to the property.

9 The Court dismisses this cause of action, but without
10 prejudice.

11 **IV. CONCLUSION**

12 The Court GRANTS the motion IN PART. The claims for breach of
13 contract, violation of the Consumer Protection Act, quiet title,
14 negligence, interference with contract, and declaratory relief are
15 DISMISSED in their entirety. (The claim for declaratory relief is
16 dismissed without prejudice.) All other claims except the claim
17 for wrongful eviction are dismissed as to Plaintiffs other than
18 Plaintiff Barragan. Plaintiffs are granted LEAVE TO AMEND their
19 complaint to state a claim for promissory estoppel as to Plaintiff
20 Barragan and to identify the non-family tenant as to the wrongful
21 eviction claim.

22
23 IT IS SO ORDERED.

24
25
26 Dated: June 9, 2015



DEAN D. PREGERSON

United States District Judge